United Nations AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1071

Case No. 1171: MADUENO-UCAR

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Julio Barboza, First Vice-President, presiding; Mr. Kevin Haugh, Second Vice-President; Mr. Spyridon Flogaitis;

Whereas, on 27 December 2000, Enrique María Madueno-Ucar, a former staff member of the United Nations Children's Fund (hereinafter referred to as UNICEF), filed an Application requesting the Tribunal:

"... [T]o order that all charges of misconduct against the Applicant be dismissed, that the decision of summary dismissal be overridden and that the Applicant be fully reinstated and compensated accordingly.

... [T]o order that the Respondent officially recognizes that a very serious mistake was made concerning the Applicant, who served that organization for 21 years of irreproachable service and this be published in the UNICEF's newsletter as well as in the Djibouti's newspaper 'La Nation', because his name and reputation have been sullied and have been dragged through the mud."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 30 June 2001 and once thereafter until 30 September 2001;

Whereas the Respondent filed his Answer on 28 September 2001;

Whereas the Applicant filed Written Observations on 18 June 2002;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNICEF on a two-year fixed-term contract as an Assistant Project Officer (Liaison) at the L-2, step I level, on 6 September 1978. At the time of the events which gave rise to the present Application, the Applicant was serving at the UNICEF Office in Djibouti, as Assistant Representative, UNICEF, at the P-4 level.

From 1 March 1994 to 26 December 1998, when the Applicant was stationed in Djibouti, he was paid a rental subsidy in respect of his residence based upon a rental agreement (lease) for a three-year period from 1 February 1994 to 1 February 1997, and a subsequent rental agreement for the period 1 March 1997 to 28 February 1998. The lease stipulated a monthly rent of 400,000 Djibouti Francs (DF). On 16 August 1994, the Applicant submitted a completed and signed Application Form for Rental Subsidy attaching a lease specifying a monthly rent of 475,000 DF.

On 29 March 1999, the Officer-in-Charge, Division of Human Resources (DHR), informed the Applicant that an audit was being conducted in the UNICEF office in Djibouti and that the "preliminary findings suggest[ed his] involvement in serious irregularities during [his] tenure as Assistant Representative". He further informed the Applicant that he was being placed on suspension with pay pending completion of the investigation.

On 11 April 1999, the son of the Applicant's landlord wrote to the UNICEF Representative, Djibouti, filing a complaint that the Applicant had failed to abide by the terms of the lease, inter alia, in that he had not paid the monthly amounts agreed upon, and that he had failed to give them a written receipt for the sale of a generator, payment for which had been arranged by deducting certain sums from the rent paid by the Applicant.

On 20 May 1999, the Director, DHR, wrote to the Applicant, transmitting a copy of the Audit Report and presenting him with formal charges. The Applicant was advised that the auditors had spoken to his landlord's son who had declared that the signature on the lease

specifying a rent of 475,000 DF was neither his nor his mother's, and had been forged. As the Applicant had failed to submit rental subsidy applications for the periods 1995-1996 and 1996-1997, but had nevertheless been receiving subsidies based on the 475,000 DF rent, he was charged with making false certifications in his applications for rental subsidy. In addition, he was charged with misappropriating UNICEF property, involving the unauthorized sale of an office generator, and misappropriating funds destined to support UNICEF programmes, by depositing a cheque from the Rotary Club for the purchase of T-shirts for the UNICEF polio campaign in his own bank account, claiming that he had paid for the T-shirts. He was advised that his actions had resulted in "a combined debt to UNICEF in the amount of US$ 33,074.38, plus related interest income", that they were a clear violation of the highest standards of integrity expected of an international civil servant and that they constituted misconduct.

The Applicant replied to the charges on 12 June 1999. He stated that the Audit Report contained "misconceptions" and "inaccuracies", which he claimed he could have cleared up had "the auditors addressed these issues to me while I was available to help them", and that the audit was not concluded in a fair and impartial manner. He denied any wrongdoing.

On 14 July and 12 August 1999, a forensic document examiner concluded that, after extensive examination of a number of documents, the signature appearing on the lease with the rent of 475,000 DF, was not that of the son of the landlord.

In a letter dated 19 August 1999, the Applicant was advised that his explanations to the charges were neither credible not plausible, that the Executive Director had concluded that his actions represented serious misconduct in violation of the highest standards of integrity required of international civil servants and that, therefore, she had decided that he be summarily dismissed in accordance with staff regulation 10.2, with immediate effect. Furthermore, his debt to UNICEF in the amount of US$ 33,074.38 would be deducted from his final entitlements and he would receive neither pay in lieu of notice nor termination indemnity.

On 17 September, 5 October and 10 November 1999, the Applicant requested that the Joint Disciplinary Committee (JDC) review the decision to summarily dismiss him. On 8 December 1999, the Director, DHR, advised the Applicant that his case had been transmitted to an ad hoc JDC, constituted at Headquarters.

The ad hoc JDC submitted its report on 3 March 2000. Its findings and conclusions read, in part, as follows:

"FINDINGS

...

3. **Due process**: The ad hoc JDC concludes that all due process and procedural arrangements were properly respected ...

CONCLUSION

... [T]he ad hoc JDC notes that the decision taken by the Executive Director was properly taken in the exercise of her discretionary authority in disciplinary matters, that the decision was not vitiated by a mistake of fact, bias, or prejudice, or a procedural error affecting the Appellant's due process rights. The ad hoc JDC therefore concludes that the case does not merit further review."

On 9 March 2000, the Executive Director transmitted a copy of the ad hoc JDC report to the Applicant and informed him that she had decided to accept the Committee's recommendation and to maintain his summary dismissal.

On 27 December 2000, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. Despite the Applicant's numerous requests that an audit be conducted at the UNICEF Office, Djibouti, such an audit was not conducted until after his departure.

2. The false information provided to the JDC by the Respondent predisposed the JDC against the Applicant and vitiated its decision.

Whereas the Respondent's principal contentions are:

1. Neither the audit nor the contested decision was vitiated by bias, prejudice, or other improper motivation on the part of the Respondent.

2. The contested decision was not vitiated by mistake of fact or error of law.

3. The Applicant was accorded all protections of due process.

The Tribunal, having deliberated from 5 to 26 July 2002, now pronounces the following Judgement:

I. In the opinion of the Tribunal there was ample evidence before the JDC to justify its conclusions:

(a) That the Applicant had submitted false certification in his claim for rental subsidy;

(b) That he had the unauthorized use of the UNICEF 16.2 KVA Lister generator and that he had disposed of same in an unauthorized manner; and,

(c) That he had misappropriated to his own use the sum of 133,600 DF being the amount of a cheque furnished to him by the Rotary Club for the use and benefit of UNICEF but which he lodged in a bank account to the benefit of himself and his wife;

which transactions were clearly capable to be found to constitute serious misconduct.

II. In support of his application for rental subsidy, the Applicant had submitted a Lease which purported to show that the rent payable was in the sum of 475,000 DF per month.

The application form in which he sought the rental subsidy was dated 16 April 1994 and to it was attached the Lease which purported to show that it was to run for the period from 1 February 1994 to 1 February 1997 at a monthly rent of 475,000 DF (being the equivalent of US$ 2,683) per month.

In the course of the investigation carried out by the Internal Audit it obtained from the landlord's son a document which purported to be the landlord's counterpart of the Lease, which he claimed governed the letting to the Applicant and this document showed a rent of 400,000 DF per month, rather than the sum which had been claimed by the Applicant. When this document was put to the Applicant, he accepted that it bore his signature.

He claims that he had signed it "*bona-fide*" at the request of the landlord's son whom he said had asked to sign it "*because it was convenient for his mother*", the landlord. The Applicant now claims that "*In retrospect, I suppose the real reason was that he [meaning the landlord's son] wanted to keep the difference*". By this he meant that the landlord's son had sought his signature on the Lease which showed the lower amount of rent because he wanted to fool his

mother into believing that the rent payable was less than it actually was, so that he could pocket the difference.

The Applicant has never explained to the satisfaction of the Tribunal what he meant when he said that he had signed the document showing the lesser rent "*bona-fide*" and the Tribunal does not understand what he means by this term if he is saying that he had signed it so that it could be used by the landlord's son to cheat his mother. "*Bona-fide*" would be a strange term to describe his motive on such a transaction.

III. The landlord and her son claim that at the beginning of August 1994 they had agreed to a reduction in the rent down from 400,000 DF as originally specified, to a sum of 350,000 DF per month and that that was the rent paid by the Applicant from August 1994 until he vacated the premises in December 1998 when he was transferred to Guinea Bissau.

The Applicant failed to produce either to the Internal Audit or to the JDC anything which either of them considered to be adequate or satisfactory documentary evidence as to the monthly payments made by the Applicant to his landlord by way of rent for the said premises and such documentary evidence as he did produce whether by way of cheques or bank statements established that for a significant period the rent paid by him was in the sum of 350,000 DF per month, being the sum which according to the landlord and her son was the reduced rent which had been agreed in August 1994.

The Applicant sought to explain the apparent discrepancy by saying that the difference was made up by him in cash payments made by him to the landlord's son but he failed to provide any proof by way of documents, being withdrawals from his bank account, receipts or otherwise, to establish those payments which were hotly disputed. Obviously when making a claim for rental subsidy it is entirely proper and appropriate that a tenant should be able to produce documentary evidence to establish the actual rent paid by him, so that his claim can be checked and verified by the Administration.

The Applicant had initially sought to stand over the validity of the Lease showing his rent at 475,000 DF per month claiming that he had a witness as to its execution who could vouch for the validity of same and who would be providing evidence of this fact by way of a statement. The landlord's son who had allegedly executed that Lease on behalf of the Applicant's landlord (who was said by the Applicant to be illiterate and whose affairs were allegedly managed for her

by her said son) denied that that document bore his signature and denounced the alleged signature thereon as a forgery.

It was accordingly examined by an expert document examiner who was said to be "*a handwriting expert*" and who expressed the view that what purported to be the landlord's son's signature was indeed a forgery. Whilst the Tribunal recognizes that expert handwriting evidence is not an exact science and that it does not enjoy the same reliability as is enjoyed by DNA analysis or fingerprint evidence, and whilst some may understandably describe it as an art rather than a science, nonetheless the Tribunal accepts that it can have strong persuasive value.

When the Applicant was informed of the opinion of the handwriting expert he then changed his tack in that he then accepted that it was likely that the landlord's son's signature thereon was a forgery but he claimed that he had no responsibility for this document or its authenticity, as he had not been present when it had been executed by the landlord's son on behalf of the landlord. He has, however, not adequately explained to the satisfaction of this Tribunal how it came about that he had submitted in support of his claim for rental subsidy a document which he now accepts is most probably a forgery, or how anyone other than himself might have benefited from forging such a document or uttering or relying on same, on the basis that it was genuine. The only interest the Tribunal can identify as enjoying potential benefit from such a forged document would be the interest of someone who was trying to benefit from such a deception and the only person whom the Tribunal can identify as possibly benefiting from a Lease showing the higher rent would be the Applicant, who had relied on the document to support his claim for rental subsidy, which would in turn relate to the amount of rent which he was obliged to pay.

The Applicant has complained in these proceedings that the said handwriting expert was not asked to compare the forged signature of the landlord's son with a known example of the Applicant's handwriting and asked if he could then say if he believed that the forged signature had in fact been forged by the Applicant. Since it was never alleged that it was the Applicant who had forged the signature but merely that he had produced a document which had borne a forged signature of the landlord's son, the Tribunal does not consider that this alleged failure was of any consequence. It was never part of the Administration's case that the Applicant personally had forged the disputed signature, merely that he had produced the Lease which bore a forged

signature. As far as the Administration is concerned the identity of the forger is neither here nor there.

In the opinion of the Tribunal the JDC, faced with the conflict of oral evidence, was entitled to rely by and large on the documentary evidence and in the opinion of the Tribunal this documentary evidence strongly supported a case that the Applicant had exaggerated his rental obligations for the purposes of fraudulently claiming a higher Rental Subsidy than he would have been entitled to receive, had he declared the true rent payable.

IV. As to the allegation concerning the use and disposal of the 16.2 KVA Lister generator, the Tribunal is satisfied that there was sufficient evidence before the ad hoc JDC to justify its findings:

(i) That the Applicant had taken the generator to his private residence without following the appropriate administrative procedures; and,

(ii) That he had ultimately disposed of the said generator in an unauthorized manner.

There was ample evidence before the said ad hoc JDC that the Applicant had:

(a) Chaired the meeting of the PSB of 16 August 1998 when it resolved to dispose of the generator as a write-off;

(b) That he had procured the technical report for the PSB which purported to establish that the generator was beyond economical repair and should be declared out of use and put aside; and,

(c) Having indicated that he would personally dispose of the allegedly valueless generator, he then sold it to his landlord and obtained the agreed purchase price by discounting from his rents for November and December 1998 a sum equal to the price which his landlord had agreed to pay for the said generator.

In the opinion of the Tribunal the ad hoc JDC was entitled to reject certain explanations or excuses advanced by the Applicant and the Tribunal is satisfied that both the conclusions of the said JDC and of the Respondent were justified by the evidence and appear to have been reached without any bias or prejudice or by the consideration of any extraneous matter.

V. As to the final allegation, the one that the Applicant had applied to his own benefit the proceeds of the cheque given by the Rotary Club as sponsorship for the 142 T-shirts, the

Tribunal considers it neither desirable or necessary that it should either analyze the evidence or express a view as to the findings of the ad hoc JDC thereon. That is because of events or developments which occurred between the time when the ad hoc JDC had furnished its report to the Respondent and the time when the Applicant submitted his Application to the Tribunal.

When the matter was being considered by the ad hoc JDC, there was before it a statement from the supplier of the T-shirts which had inter alia stated that the Applicant had requested and obtained from him signed blank invoices for the purpose of processing payment to the said supplier. The ad hoc JDC was apparently influenced in its report by the fact that the Applicant had failed to deal with or respond to that allegation, for it specifically noted that he had not made such a reply. This may indicate that the ad hoc JDC had been influenced against the Applicant in relation to its finding by his failure to answer that allegation. The Tribunal notes that the Applicant has produced for consideration of the Tribunal a document which suggests that the said supplier of T-shirts had following upon the Administration's decision to summarily dismiss the Applicant sought to since withdraw or retract his original statement in which he had implicated the Applicant, saying that it was false and made under duress or pressure from the auditors.

The Tribunal passes no comment on the authenticity or nature of the document produced by the Applicant, save to note that it does not emanate from the said supplier nor does it consider it either necessary or appropriate to seek to determine what effect, if any, this should have on the said ad hoc JDC's decision on that particular allegation, save to note that no *mal fides* can be inferred as the said purported retraction was not apparently made until long after it had issued its report. Suffice it to say that no matter what the effect it might have had, the Tribunal is satisfied that the other and unaffected findings had by themselves established sufficiently grave incidents of serious misconduct on the part of the Applicant as would have justified his summary dismissal from his post. The Tribunal is satisfied that even without the adverse finding on the Rotary Club cheque charge that the Administration's decision would have remained that he should have been summarily dismissed.

VI. In all of the circumstances the Tribunal is satisfied that there was ample evidence to support the findings of serious misconduct as against the Applicant and the Tribunal can find no evidence to support a contention that either the ad hoc JDC or the Respondent were motivated or

influenced by any malice or prejudice or that there was any improper consideration of any extraneous matter.

The Tribunal is likewise satisfied that the Respondent was fully entitled to have considered that the matters found against the Applicant constituted serious misconduct on his part and that it was of such a nature as to warrant the summary dismissal of the Applicant.

VII. Accordingly, the Application is rejected in its entirety.

(Signatures)

Julio BARBOZA
First Vice-President

Kevin HAUGH
Second Vice-President

Spyridon FLOGAITIS
Member

Geneva, 26 July 2002

Maritza STRUYVENBERG
Executive Secretary